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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 859.

C. L. ASHTON, ET AL.,
Petitioners,

v.

CAMERON COUNTY WATER IMPROVEMENT DISTRICT NO. ONE.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

ADDITIONAL TEXAS STATUTES, ETC. FILED BY PETITIONERS.

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Art. 7627. Petition feasible—recorded

If, at the hearing of such petition, it shall appear to the satisfaction of the court that the organization of such district and the construction or purchase, or the construction and purchase of the proposed irrigation system, or that co-

operation with the United States as in Article 7622 provided, is feasible and practicable, and that it is needed and would be a public benefit and a benefit to the lands included in the district then the court shall so find, and cause its findings to be entered of record; but if the court should find that the irrigation of lands in such district is not feasible and practicable and that it would not be a public benefit or is not needed or would not be a public utility, then the court may enter such findings of record and dismiss the petition at the cost of the petitioners.

Art. 7631. Who may vote

The manner of conducting elections herein provided for shall be governed by the general election laws of the State except as herein otherwise provided. At such election none but resident property taxpayers who are qualified voters under the laws of the State shall be entitled to vote. The county commissioners' court shall at the time of ordering said first election, by an order entered of record, create said proposed district, or the part thereof within said county, into one or more election precincts and shall name a polling place in each voting precinct, and shall appoint two judges and two clerks for each polling place, one of the judges to be designate (designated) as presiding judge. If any said officer so elected fail to serve, his place shall be filled in the manner provided by the general election laws. The court shall order printed one and one-half times as many ballots for said election as there are estimated to be qualified voters within such district. Said ballots for said election shall have printed thereon substantially the following: "For Water Improvement District," "Against Water Improvement District," "For Issuance of Notes of Said District," "Against Issuance of Notes of Said District," and said ballots shall contain five blank lines upon which to write names of persons voted for, for the office of director with a heading, "For Directors,

Five to be Elected." No other matter shall be placed on the ballot except the heading "Official Ballot."

Art. 7652. Directors to Control District.

The board of directors herein provided for shall have control over and management of all the affairs of such district, shall make all contracts pertaining thereto, and shall employ all necessary employees for the proper handling and operating of such districts, and especially may employ a general manager, an assessor and collector, attorneys, a bookkeeper, an engineer, water master and such other assistants and such other laborers as may be required, and they may also buy all necessary work animals, motors, pumps, engines, boilers, machinery and supplies as may be required in the erection, operation and repair of the improvements of the districts; a director may be employed as general manager, and at such compensation as may be fixed by the other four directors and when so employed he shall also perform the duties of a director, but he shall not receive the compensation in this Act provided to be paid to directors.

Art. 7655. Districts sued

All districts established under the provisions of this Act may sue and be sued in any and all courts of this State in the name of such district, and all courts of this State shall take judicial knowledge and notice of the establishment of such district and the boundaries thereof, and such districts shall contract and be contracted within the name of such districts.

Art. 7680. Attorney to bring suit

Twenty days after the publication of such notice or as soon thereafter as practicable, the directors for such water improvements or irrigation shall employ an attorney to bring suit in the name of the district in the district court

of said county for the purpose of collecting all taxes, interest, penalty, and costs due upon said land. Said petition shall describe all lands upon which taxes and penalties shall remain unpaid and the total amount of taxes and penalties due thereon with interest computed to the time fixed for the sale of said land at the rate of six (6%) per cent per annum, and shall pray for a judgment for said amount, and for the fixing, establishing and foreclosing of the lien existing against such land; that said lands be sold to satisfy said judgment for all taxes, interest, penalty and costs, and for such other relief to which such district may be entitled under the law and facts. All suits to enforce the collection of taxes as provided in this Act shall take precedence and have priority over all other suits pending in the district court.

Art. 7718. Directors elected or appointed

There shall be held on the second Tuesday in January, 1924, and every two years thereafter, a general election, at which time there shall be elected five directors for such district, who shall be the elective officers for such district. Provided, that in all such districts containing not to exceed twelve thousand acres, in which sixty per cent or more of the lands in such district are owned by persons who do not reside in the district, the directors shall be apointed by the county commissioners' court of the county in which the district is situated. The term of office for such directors shall be two years and they shall be so appointed at the same time fixed for the election of directors in other districts and if for any reason the county commissioners' court is not in session at the time the said court shall convene and appoint said directors as soon thereafter as possible. The owners of the lands in such district may file with the county commissioners' court petitions expressing their choice of persons to be selected as directors, and if the owners of sixty per cent of such land, and if sixty per cent of such

land-owners, agree upon the persons to be appointed, the persons so agreed upon, if qualified, shall be appointed. Otherwise the said court shall appoint suitable qualified persons as such directors.

Art. 7723. Right of eminent domain

The right of eminent domain is hereby conferred upon all districts established under the provisions of this chapter for the purpose of condemning and acquiring the right of way over and through all lands, private and public, except as hereinafter indicated, necessary for making reservoirs, canals, laterals, and for pumping sites, drainage ditches, levees and all other improvements necessary and proper for such districts, and the authority hereby conferred shall authorize and empower such districts to condemn all lands, private and public, for the purposes herein indicated beyond the boundary of such districts and in any county within the State of Texas; the right of eminent domain shall not extend to land used for cemetery purposes, nor to property owned by any person, association of persons, corporation or water improvement district, and used for the purpose of supplying water under the laws of this State and necessary for the making of reservoirs, canals, laterals, pumping sites, levee and drainage ditches, or other appurtenant work by such owner. All such condemnation proceedings shall be under the direction of the directors and in the name of the irrigation or water improvement district, and the assessing of damages and all procedure with reference to condemnation, appeal and payment shall be in conformity with the statutes of the State and as provided in Title 52 of this Act relating to "Eminent Domain," and all such compensation and damages adjudicated in such condemnation proceedings shall be paid out of the construction and maintenance fund of said district.

Art. 7764. District validity created

The Act of the Twenty-ninth Legislature, being Chapter 50 of the Acts of 1905, and the Act of the Thirty-third Legislature, being Chapter 172 of the Acts of 1913, and Chapter 138 of the Acts of 1915, are hereby repealed. All districts heretofore organized under the terms and in accordance with the provisions of said Acts are hereby expressly declared to be validly created, organized, described and defined with boundaries as prescribed by the order of the commissioners' court organizing the same, or as the same have since been changed by the board of directors thereof in the manner provided by said Acts. Such districts, however, shall hereafter be governed by the provisions of this chapter; provided, however, that the duly constituted and qualified officers of such districts shall continue to perform the duties of such offices until the next general election held under the provisions of this chapter.

All bonds issued by such district, which have been declared valid by a judgment of the district court, shall be and be held to be valid and binding obligations of such district and not subject to attack, except for actual fraud. Any such district may change its name to the name herein provided for such districts by filing a declaration to that effect with the commissioners' court of the county or counties in which it is situated, and which said declaration shall be in the form of a deed of conveyance and duly acknowledged by the president and secretary of the district, and shall embody and set forth a copy of the minutes of said board of directors, and show the resolution adopted for the change of such name, and when such instrument shall have been so recorded, the name of such district shall hereby be changed.

All districts in the process of organization under existing laws repealed by this Act, are hereby declared to be valid districts and entitled to proceed in accordance with the provisions of said Act so repealed until the date upon

which this Act shall take effect after which, said districts shall be governed by the provisions of this chapter, and said districts shall change their name to conform to the provisions of this chapter by filing a declaration as above provided, in the office of the county clerk of the county or counties in which they are situated; and if they have not proceeded to the point of election of directors, they shall change such name by making application to the county commissioners' court having jurisdiction thereof, which said court shall change said name upon all orders thereafter issued relating to said district.

Art. 7769. Conditions of tax levied

The tax as levied in connection with the original issuance of bonds shall remain in force from year to year as the levy for that purpose, until a new levy shall be made. The board of directors may, from time to time, increase or diminish such tax so as to adjust the same to the taxable values of the property subject to taxation by the district and the amount to be collected, and in such manner as to raise an amount sufficient to pay the annual interest and sinking fund on said bonds then outstanding.

Art. 7791. Adopt rate of commissioners' court

Irrigation and water improvement districts operating under the provisions of laws of this State, and assessing taxes on the ad valorem basis, may, if they find it to their advantage, adopt the assessment and equalization of values of the property authorized therein for taxation as made and equalized by the county officers and the county commissioners' court and base the levy and collection of taxes on such assessment and equalization, and they shall also have authority to secure from the county tax assessor, a list of tax renditions as made to him covering the property within said district, and adopt same for the use and benefit of said district by causing the tax assessor and collector of

the district to compile same as the tax roll of the district instead of making independent assessment thereof. In the event that the district tax assessor and collector and district directors should for any reason fail or refuse to properly assess, equalize tax values, and prepare a tax roll for said district, as provided by law, then in that event the taxes levied at the time of issuance of bonds or other valid obligations of said district shall be collected by the county tax collector by entering on his rolls the said tax as against all property situated within such district for the year or years which the said district officers may have so failed to perform their said duties. If the tax levy is not sufficient because of decreased valuations same shall be increased by order of the commissioners' court.

The fund so collected by such county tax collector shall be deposited in the county depository as a special fund to be devoted to the payment of interest and sinking fund on such bonds or other obligations, and such fund shall be paid thereon upon order of the county commissioners' court. In the event any such county tax collector should fail or refuse to perform such duties then the holders of such securities, bonds or obligations, or any one or more of them, may compel him to do so by mandamus proceeding in the court of proper jurisdiction. The county tax collector shall be allowed, in addition to all other compensation now provided by law reasonable fees for the performance of such duty, to be fixed by the county commissioners' court, not to exceed, however, the rate of compensation fixed by law for the performance of like duties in the collection of county funds. Whenever such district officers shall fail to perform and discharge their duty, in the assessment and valuation of the property and collection of taxes, as hereinabove provided, then any bond holder or other person intersted in said district and the payment of their obligations may request the county commissioners' court to enter an order authorizing the county tax collector to perform the duties herein provided, and the county commissioners'

court shall investigate said matter, and if they find said conditions to exist shall enter an order directing the county tax collector to proceed as herein provided, until so ordered by the county commissioners' court. The provisions of this section are not intended to allow anyone to interfere with the duties of the district officers so long as they are in the active discharge of their duties, but such powers shall be exercised in the event such district officers shall not perform their duties or in the event of a vacancy in said offices.

In the event of any dispute arising as to whether or not said officers are so performing their duties, said matter may be determined by an action against said officers in the district court in the nature of a mandamus suit or in injunction proceedings restraining such officers from interfering with the collection of such taxes and the payment of said obligations by said county tax collector, and said county commissioners' Court of Civil Appeals and a judgment of the Court of Civil Appeals shall be final. In the event any such district embraces territory in two or more counties, the duties herein provided for the county tax collector and county commissioners' court shall be performed by such officers as to all such property lying within the county.

Art. 7797. May sue to protect bonds

All water improvement districts and irrigation districts heretofore or hereafter organized under the laws of the State being dependent upon their water rights and water supply to perform their public duties and to protect their bonds and other indebtedness created under the provisions of the law and to maintain their taxable values and assessable values, shall have full authority to maintain any action or suit for such purposes.

Art. 7798. May sue to protect bonds

The board of directors are hereby empowered to institute and maintain any suit or suits to protect the water

supply of said district and to prevent any unlawful or unwarranted interference with or diversion of such water supply. All water improvement districts and irrigation districts shall have full power and right to protect their water supply and all other rights and property and by proper suit to prevent any taking or interference with such water supply, of whatever nature or however acquired, necessary to the uses of such district or for the irrigation of the lands situated therein.

From Bankruptcy Law Service, Commerce Clearing House.

(Sec. 2803) *Constitutionality of New Law.*—The general power of Congress to extend bankruptcy jurisdiction to municipalities was upheld by the Attorney General in an opinion prepared by Charles Weston, Special Assistant, and issued on April 21, 1933. Excerpts from this opinion follow below:

Approaching the question whether Congress may enact any form of bankruptcy legislation applicable to municipalities, it should be borne in mind that Congress alone can effectively act. The Constitution prohibits the States from enacting any law "impairing the obligation of contracts," and this prohibition covers a law discharging insolvent debtors from liabilities incurred pror to its passage. (*Sturges v. Crowinshield*, 4 Wheat. 122) While it is conceivable that the Constitution may have intended to foreclose any legal method of altering the debts of insolvent municipalities and have intended a constitutional impasse in this field, it would seem that only cogent reasons should compel this conclusion. There being no express restriction upon the power of Congress and States being powerless to alter the existing debts of insolvent municipalities, the question arises as to whether there is any implied limitation upon the power of Congress.

Assuming that Congress cannot, even with State consent, enact a bankruptcy law applicable to a State, it does not

follow that the power of Congress is equally limited in the case of municipalities. Municipal corporations are of a dual character. They exercise both "powers which are governmental and powers which are of a private or business character," and in the latter capacity the municipality "is a mere legal entity or juristic person." (*Vilas* v. *Manila*, 220 U. S. 345, 356.)

A municipality is, in one respect, merely "a political subdivision of the State, created as a convenient agency for the exercise of such of the governmental powers of the State as may be entrusted to it," and the State may take, without compensation, property which the municipality holds and uses for governmental purposes. (*Trenton* v. *New Jersey*, 262 U. S. 182, 185, 186.) But it has been held that the State cannot take, without compensation, property which a municipality owns in its private and proprietary capacity. (*Mount Hope Cemetery* v. *Boston*, 158 U. S. 509; see *Hunter* v. *Pittsburgh*, 207 U. S. 161, 179.)

The proprietary capacity of municipalities has been fully recognized. When engaged in performing duties undertaken in this capacity, it is, like a private corporation, liable for the negligence of its agents (*Trenton* v. *New Jersey*, *supra*, p. 191.) In a large number of States the private property of municipalities, not held for governmental purposes, may be sold on execution. (Dillon, Municipal Corporations, 5th ed., sec. 992.) The United States and the several states are not, without express words, bound by general statutes of limitations, but a municipality is so bound. (*Metropolitan Railroad Co.* v. *District of Columbia*, 132 U. S. 1, 11.) When the Philippine Islands were ceded to the United States, the Spanish municipality of Manila was not obliterated by the extinction of the sovereign creating it, because a municipality, in exercising powers of a private or business character, "stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred." (*Vilas* v. *Manila*, *supra*, pp. 355-356.)

It has been held that a municipal corporation may be prosecuted for violation of a State law regulating hours of employment. (*People* v. *City of Chicago*, 256 Ill. 558.) A libel in personam lies against a municipality for a maritime tort for which it is not liable under the local law, but such a libel does not lie against the State. (*Workman* v. *New York City*, 179 U. S. 552; Ex parte State of New York, No. 1, 256 U. S. 490.)

In my opinion the private or proprietary capacity of a municipality is sufficiently distinct and definite to bring it wthin the purview of the bankruptcy power of Congress where the State, as the representative of the municipality's governmental functions, has given its consent.

The objects of bankruptcy legislation, *i. e.*, the equitable distribution of assets and equal treatment of creditors on the one hand, and relief of debtors on the other, would seem to apply to insolvent municipal corporations. Where insolvency in fact exists, creditors need the aid of the bankruptcy court to secure equal treatment and the municipality requires some form of relief. The difficulties which may arise when a municipality becomes insolvent are strikingly illustrated by the facts presented in *Meriwether* v. *Garrett* (102 U. S. 472).

It may be contended that the immunity of municipalities from bankruptcy would tend to improve their credit and that therefore upon grounds of public policy the Constitution should be interpreted as conferring such immunity. But the credit of municipalities rests, in final analysis, upon belief in their solvency. Some loss is inevitable if liabilities actually exceed assets. The only bankruptcy relief which the creditor has reason to fear is that which is improper, that is, where bankruptcy is used as a cloak to escape obligations which could, with a proper exercise of good faith, be met. The mere possibility of abuse is not a sufficient ground for viewing bankruptcy relief to municipalities as necessarily opposed to public policy.

It is, therefore, concluded that general grounds of public policy do not indicate an implied limitation, in the case of municipalities, upon the power of Congress to deal with the subject of bankruptcies.

It may be urged that bankruptcy relief is inapplicable to a municipality, first, because its solvency cannot be measured or judged by the usual criteria and, second, because of the limited character of the relief available to creditors in a bankruptcy proceeding.

Solvency of a municipality cannot be measured by the value of its property, which, generally speaking, is immune from seizure by creditors and measuring solvency in terms of the relation between revenue and expenditure presents serious practical difficulties. Income is derived primarily from taxes. Theoretically there are no limits to exercise of the taxing power, but a city may be unable to collect taxes which it has levied or it may have reached the legal limits of its taxing power. Taxes cannot be raised to a point where they destroy the life of the community and hence destroy themselves, and there are limits to the extent to which a city can curtail services and expenditure. Where real estate values have collapsed, a city may be permanently unable to pay in full debts incurred when values were at higher levels. Today many municipalities are in default. It cannot be doubted, therefore, that a city may be unable to pay its debts in full and, if this be so, the difficulty in determining this fact is of no legal significance.

The maximum relief to creditors given by the pending bills is a composition under the approval of the court, plus jurisdiction to preserve the assets of the city until final approval or failure of composition. It is now settled that composition, without adjudication in bankruptcy, is a proper bankruptcy remedy. (See sec. 12 of the present Bankruptcy Act; *In re Reiman*, 20 Fed. cases 490.) Under section 75 of the present Bankruptcy Act (act of March 3, 1933, Public, No. 420, 72nd Cong.) any farmer may file a petition to effect a composition or extension of time to pay his debts

and no provision is made for a distribution of his property to creditors if the composition or extension proposal fails.

I conclude that bankruptcy relief is not in its nature inapplicable to municipalities.

It is an established constitutional principle that the United States and its governmental instrumentalities are free from taxation by the States and that the States and their governmental instrumentalities are likewise free from taxation by the United States. (*Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 575.) The principle is "implied from the necessity of maintaining our dual system of government" and, since it springs from that necessity, "it does not extend beyond it." (*Board of Trustees of University of Illinois* v. *United States*, decided by the Supreme Court, Mar. 20, 1933.)

The foregoing principle has a bearing upon the question whether Congress may confer upon municipalities the requisite authority to file a petition under a Federal bankruptcy law, even though it is assumed that the law is enacted primarily for the benefit of the municipalities and that its operation would not interfere with their governmental functions. Congress cannot regulate, directly or indirectly, the fiscal policies of the States or their governmental agencies. The States are entitled to determine for themselves whether or not their municipalities shall be permitted to go into a Federal bankruptcy court and adjust their debts. For Congress to assume to grant this authority when it had not been given by the State itself, either by general law or by special enactment, would seem to constitute a prohibited encroachment into a domain where, under our Constitution, the State is supreme.

I conclude that the authority of a municipality to file a petition under a Federal bankruptcy act must be derived from State law and that the mere fact that the State has not prohibited such action is not sufficient.

It may be contended that, if the authority of municipalities to avail themselves of a Federal bankruptcy act must

be derived from the laws of the respective States, the law will not be uniform throughout the United States, as required by the Constitution.

Hanover National Bank v. *Moyses*, 186 U. S. 181, held that the bankruptcy law was not wanting in uniformity because it provided that exemptions should be determined by local law, the court saying (p. 188) that the uniformity required was "geographical and not personal."

The situation under consideration here is not the same as it would be if Congress passed a bankruptcy act which provided that the private debtors who came within its terms should be determined by local law. Even then the law would be geographically uniform as to all debtors within its scope. But in the case of municipalities the necessity of authorization under local law would be only what the Constitution required (if the views previously expressed are correct). Where Congress had provided for uniformity insofar as lay within its power there would be no want of the requisite uniformity.

Neither the United States nor the States may abdicate essential powers of government or delegate them to another sovereign. (See *In re Rahrer*, 140 U. S. 545, 560.) But a State law authorizing municipalities to file petitions under a Federal bankruptcy law which does not permit interference with the municipalities' governmental functions would not constitute such an abdication or delegation.

The United States may waive immunity against State action where such waiver does not extend to an essential power of government, and it necessarily follows that the States may waive like immunity against Federal action. It was early held that the United States could authorize the States to tax national banks, although without such authorization national banks are immune from State taxation (*Van Allen* v. *The Assessors*, 3 Wall. 573, 584). Congress may permit the States to regulate articles while still in the course of interstate commerce, regulation which would be invalid apart from such permission (*In re Rahrer, supra*).

And a State, by voluntarily submitting to the jurisdiction of the Federal courts, waives its immunity against suit and becomes bound to the same extent as any other litigant (*Clark* v. *Barnard*, 108 U. S. 436).

A State law authorizing municipalities to file a petition in bankruptcy would not be a law impairing the obligation of contracts. It would be the Federal, not the State, law which impaired the obligation of contracts, the State's consent operating merely as a partial waiver of its immunity against Federal action affecting its own powers of government.

In my opinion there is no constitutional bar against State legislation which permits municipalities to accept the provisions of a Federal bankruptcy law along the lines of the pending bills.

This memorandum has heretofore dealt only with the bankruptcy power of Congress with reference to municipal corporations, using this phrase in its strict and proper sense. A municipal corporation has been defined as "the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof," and distinguished from a public or quasi corporation (sometimes called municipal corporation), "the principal purpose of whose creation is as an instrumentality of the State, and not for the regulation of the local and special affairs of a compact community." (Dillon, Municipal Corporations, 5th ed., pp. 58, 60.) A public or quasi corporation, such as a county or school or water district, is "but an instrumentality of the State," incorporated by the State "that it may the more effectually discharge its appointed duty." (*Ibid*, p. 67.) It has been said of them:

> "Their powers are not uniform in all the States, but these generally relate to the administration of justice, the support of the poor, the establishment and repair of highways, all of which are matters of state, as distinguished from municipal concern. They are purely auxiliaries of the State; and to the general statutes of

> the State they owe their creation, and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject." (*Ibid.*)

Public or quasi corporations "rank low down in the scale or grade of corporate existence" and are to be distinguished from true municipal corporations "which are invested with more powers and endowed with special functions relating to the particular or local interests of the municipalities, and to this end are granted a larger measure of corporate life." (*Ibid.*) By reason of this difference "nearly all of the courts have drawn a marked line of distinction between municipal corporations and quasi corporations, in respect to their liability to persons injured by their neglect of duty; holding the former liable, without an express statute giving the action, in cases in which the latter are not considered liable unless made so by express legislative enactment." (*Ibid.*)

It seems foreign to the conception of bankruptcy to extend its remedies and the jurisdiction of its courts to a purely governmental body. Historically, at least, bankruptcy legislation represented remedies and relief which the sovereign granted to adjust the relations between creditor and debtor when private persons, individual or corporate, became insolvent. It was never supposed that the sovereign itself could adjust its own debts through the medium of the bankruptcy court. For the United States to provide such relief for the States would seem, under our dual system of government, equally beyond the scope of bankruptcy legislation. It would, therefore, seem that Congress could bring within the scope of its bankruptcy legislation only private debtors and those other corporate bodies which, although they exercise by delegation certain governmental functions, also have a definite private or proprietary capacity, in which capacity they have many of the characteristics of a private juristic person.

It was the particular purpose of our Constitution to mark out the respective boundaries of Federal and State power. True, the Federal Government, when exercising the powers conferred upon it by the Constitution, is supreme and Congress can make all laws necessary and proper for carrying into execution its express powers. But we are not here concerned with the extent of the incidental powers of Congress; the question is the extent of its express power. In my opinion the Constitution did not mean to permit Congress, through the medium of bankruptcy laws, to break down the boundaries between Federal and State power even if the States gave their consent. It follows that, if the Constitution does not confer this power upon Congress, its lack of authority cannot be supplied by acquiescence of the States. The situation is entirely different where the Constitution itself provides that Congress can act only with State consent or that the States can act only if Congress consents. (See art. I, sec. 10, clauses 2 and 3; art. IV, sec. 3, clause 1.)